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No. 90-1196

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY SIMNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly ordered that petitioner be detained prior to trial pursuant to the Bail Reform Act of 1984 on the ground that no condition of pretrial release would reasonably assure the safety of other persons and the community.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. A2-A4), the district court (Pet. App. A9-A13), and the magistrate (App., *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1990. A petition for rehearing was denied on January 8, 1991. The petition for a writ of certiorari was filed on January 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 5, 1990, FBI agents arrested petitioner on a criminal complaint charging her with kidnaping, in violation of 18 U.S.C. 1201(a). The government moved for pretrial detention pursuant to the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* Following an evidentiary hearing before a magistrate in the Northern District of Illinois, petitioner was ordered detained pending trial. Petitioner sought review of the detention order in the district court. Following a further hearing, the district court denied her motion for release on bail. The court of appeals affirmed. On February 7, 1991, the grand jury returned a 38-count indictment charging petitioner with various racketeering and other offenses, kidnaping, and obstruction of justice.[1] A hearing on pretrial motions is scheduled for March 22, 1991, at which time a trial date should be set. Petitioner continues to be detained pending trial.

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[1] The indictment specifically charged petitioner with conspiracy to conduct the affairs of an enterprise, namely, a prostitution network, through a pattern of racketeering activity (RICO) (Count 1), in violation of 18 U.S.C. 1962(d); a substantive RICO offense (Count 2), in violation of 18 U.S.C. 1962(c); causing an individual to travel in interstate and foreign commerce with the intent to promote prostitution offenses (Count 3), in violation of 18 U.S.C. 1952; inducing an individual to travel in interstate commerce to engage in prostitution (Counts 4-33), in violation of 18 U.S.C. 2422; obstruction of justice (Counts 36 and 38), in violation of 18 U.S.C. 1503; and kidnaping (Count 37), in violation of 18 U.S.C. 1201(a). Although an indictment must usually be filed within 30 days of arrest under the Speedy Trial Act, 18 U.S.C. 3161(d), the district court extended the 30-day period due to the complexity of the investigation into petitioner's racketeering activity.

1. At the pretrial detention hearing, the government relied on the testimony of FBI Special Agent Royden Rice.[2] Agent Rice testified that petitioner operated a prostitution network, called M & C Consultants, from her home in Glenwood, Illinois. Petitioner advertised her company as an escort service providing escorts for customers in the Chicago area for lingerie modeling and other entertainment, but in fact the escort service was a front for prostitution. Rosemary Krager worked for petitioner's business for two years. She answered incoming calls from customers, arranged "dates" between customers and the prostitutes, and dispatched the prostitutes and their drivers to meet customers. Gov't C.A. Br. 4-5.

In 1990, Krager agreed to cooperate with the FBI as a confidential informant. In September 1990, petitioner began to suspect that she was under investigation. On September 16, 1990, she met with her employees in a hotel room and instructed them not to cooperate with the authorities. On October 4, 1990, when Krager arrived at petitioner's residence to begin working, petitioner asked Krager if she was cooperating with the FBI. When Krager denied that she was cooperating, petitioner pulled a semi-automatic pistol from her purse. Krager then admitted that she was assisting the FBI. Gov't C.A. Br. 5-6.

Petitioner questioned Krager extensively about her cooperation. Petitioner also informed Krager that

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[2] Agent Rice based her testimony on knowledge gained through personal observation, by listening to electronically intercepted conversations between petitioner and an undercover agent and between petitioner and a confidential informant, and through interviews with the informant and other agents. Gov't C.A. Br. 9.

the wife of a reputed mobster who had testified against petitioner's husband in federal court is not safe now because "we will get her." Krager understood the remark as a threat that if Krager testified against petitioner, Krager too would be in danger. Petitioner strip searched Krager and searched Krager's purse, removing a piece of paper listing the telephone number of Krager's FBI contact. Petitioner then led Krager out of the house, ordered Krager to lie on the floor in the back seat of petitioner's Cadillac, and covered Krager with a blanket. Petitioner drove to her attorney's office, left a message for him, and returned to her home to await her attorney's call. Gov't C.A. Br. 6-7.

That evening, petitioner ordered Krager back into the Cadillac and drove her to Indiana, where petitioner visited her sister in a hospital. Petitioner, who carried the pistol in her purse, was accompanied on the trip by another sister, Linda Anderson, and her sister-in-law, Mary Price. The three women did not leave Krager alone at any point that evening. After the hospital visit, the four returned to petitioner's home. Petitioner went upstairs, leaving Krager in the kitchen with Price and Anderson. While petitioner was upstairs, Krager ran for her car, jumped in, and locked the door. As Price and Anderson pounded on her car windows, Krager drove away. Petitioner then pursued Krager in her Cadillac. After ten minutes, Krager saw a police officer and sought his help. The officer put Krager in protective custody and contacted the FBI. Gov't C.A. Br. 7-9.

Petitioner was arrested the following morning. Pursuant to a warrant, FBI agents searched her home and found the owner's manual for a semi-automatic pistol, a partially empty box of ammunition for a

pistol, the piece of paper that petitioner had removed from Krager's purse, and more than $100,000 in cash. Although Krager had previously seen two handguns and two rifles at petitioner's residence, none was recovered that morning. Petitioner has a prior conviction for unlawful use of a weapon. Gov't C.A. Br. 9.[3]

2. Based on the evidence presented at the hearing, the magistrate found that the kidnaping offense constituted a crime of violence and that petitioner had threatened Krager both verbally and with a handgun. App., *infra*, 2a. The magistrate found that the government had presented sufficient evidence of the kidnaping to support the charge. The magistrate also found that petitioner had previously been charged with unlawful use of a weapon and that she had a motive for the kidnaping, namely, to frustrate the investigation of her prostitution network. The magistrate then concluded, "[c]onsidering the nature and seriousness of the danger to Krager that would be posed by [petitioner's] release, the Court finds that a serious risk that [petitioner] will attempt to obstruct justice or attempt to threaten, injure or intimidate Krager or others in the community exists." *Id.* at 3a. The magistrate also found that "the government has established by clear and convincing evidence that [petitioner] is a serious risk to the safety of the community, and that there is no condition or combination of conditions that will reasonably assure the safety of the community." *Ibid.*

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[3] Mary Price, Linda Anderson, and petitioner's brother-in-law, who had seen Krager at the hospital in Indiana, testified on petitioner's behalf that Krager was not held against her will on the evening of October 4, and that she left petitioner's home peacefully. Gov't C.A. Br. 10.

Accordingly, the magistrate granted the government's motion for pretrial detention. *Ibid.* See 18 U.S.C. 3142(e).

Following a de novo review of the record, the district court adopted the magistrate's findings. The district court continued petitioner's detention because petitioner is a "danger to Rosemary Krager." Pet. App. A12. The court of appeals affirmed. The court concurred in the finding of the district court that "no combination of conditions would reasonably assure the safety of the community if [petitioner] were released on bond." *Id.* at A3.

ARGUMENT

Since the petition was filed, petitioner has been indicted on charges of kidnaping, obstruction of justice, racketeering and other offenses relating to the operation of her prostitution network. Consequently, to the extent that petitioner contests her detention because it preceded the return of the indictment (see Pet. 37-46), that claim is now moot.[4]

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[4] In any case, the Bail Reform Act authorizes pretrial detention of an "arrested person" even before an indictment is returned. 18 U.S.C. 3141(a). See, *e.g.*, *United States* v. *Simpkins*, 826 F.2d 96 (D.C. Cir. 1987). There is no merit to petitioner's claim (Pet. 45-46) that the four-month period between her arrest and the return of the indictment violated the Speedy Trial Act. Although the Act requires indictment within 30 days of arrest, that 30-day period is subject to expansion by excludable delay. See 18 U.S.C. 3161(b) and (h). In this case, the district court granted excludable ends-of-justice continuances, pursuant to Section 3161(h)(8) of the Act, to give the government additional time to pursue its investigation of petitioner's illegal activities. Petitioner's kidnaping of Krager abruptly ended an undercover investigation of petitioner's escort service before the government was prepared to indict. Once petitioner was arrested and the busi-

The court of appeals properly rejected petitioner's claim that the government failed to demonstrate that "no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community." 18 U.S.C. 3142(e). Agent Rice testified that petitioner has twice attempted to obstruct the criminal investigation. First, at a meeting in a hotel on September 16, 1990, petitioner advised her employees not to cooperate with the FBI. Second, on October 4, she kidnaped government informant Rosemary Krager at gunpoint and threatened Krager that she would be punished if she testified against petitioner. Petitioner held Krager for ten hours before Krager escaped, and even then petitioner pursued Krager in her car until Krager obtained the protection of a police officer. Moreover, petitioner has a prior conviction for illegal use of a weapon. In short, the evidence plainly showed that petitioner would take drastic measures to insulate herself from criminal prosecution and that she therefore poses a serious threat to the safety of the community. See *United States* v. *Delker*, 757 F.2d 1390, 1400-1401 (3d Cir. 1985) (finding that no condition or combination of conditions would reasonably assure the safety of the community where defendant threatened and intimidated witnesses after learning of a government investigation into his business activities).

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ness ceased, the government was required to pursue its investigation by different means. In short, petitioner's violent interference with the investigation required the government to seek excludable continuances. Petitioner is therefore not entitled to release under the Speedy Trial Act. See 18 U.S.C. 3164(b) (periods of excludable delay also extend the 90-day limit on pretrial detention).

Petitioner nevertheless argues (Pet. 26-34) that the district court should not have credited Agent Rice's testimony because it was hearsay. The Federal Rules of Evidence do not apply, however, to pretrial detention hearings. Fed. R. Evid. 1101(d)(3); 18 U.S.C. 3142(f). Therefore, to the extent that Agent Rice's testimony was hearsay, it was nevertheless admissible. See *United States* v. *Fortna*, 769 F.2d 243, 250 (5th Cir. 1985); *United States* v. *Acevedo-Ramos*, 755 F.2d 203, 207-208 (1st Cir. 1985). Moreover, the testimony was reliable.

Although Agent Rice's description of the kidnaping came from information that she had received from the victim, Rosemary Krager, Krager's version of the events was corroborated by evidence seized from petitioner's residence the following morning, which included a manual for a semi-automatic pistol, ammunition for the pistol, and the piece of paper that petitioner had removed from Krager's purse. Krager's story was also corroborated by the fact that she sought the protection of the first police officer she saw after fleeing from petitioner's home.

To support her claim that Agent Rice's testimony was insufficient to establish dangerousness, petitioner relies on the testimony of her own witnesses (her sister, sister-in-law, and brother-in-law) that Krager was not detained against her will. Pet. 29-31. But as those witnesses acknowledged, if they had testified to the contrary they would have been admitting their guilt as accomplices to the kidnaping. See Gov't C.A. Br. 10. The decision of both courts below to discredit their testimony should not be disturbed here. See *United States* v. *Portes*, 786 F.2d 758, 763 (7th Cir. 1985) (appellate court must give great weight to the credibility assessments of the judicial officer at a detention hearing).

There is no merit to petitioner's argument (Pet. 34-35) that pretrial detention is unwarranted because conviction on the kidnaping charge is "unlikely" or would not be "sustainable." Specifically, petitioner argues that Krager was not kidnaped because she was free to leave. Although petitioner's relatives testified at the detention hearing that Krager had many opportunities to escape, both the magistrate and the district court rejected that version of the facts. At trial, the jury will likewise be free to discredit petitioner's evidence in favor of the government's proof that Krager was forcibly detained against her will for ten hours. The government was not required to prove the kidnaping charge beyond a reasonable doubt at the detention hearing. To the contrary, "Section 3142 neither requires nor permits a pretrial determination that the person is guilty." *United States* v *Winsor*, 785 F.2d 755, 757 (9th Cir. 1986).

Petitioner's claim (Pet. 37) that the detention order lacked the findings required by 18 U.S. 3142(i) is simply wrong. The magistrate issued a four-page detention order that was replete with findings of fact, including a finding that "the government has established by clear and convincing evidence that [p]etitioner is a serious risk to the safety of the community, and that there is no condition or combination of conditions that will reasonably assure the safety of the community." App., *infra*, 3a. The district court's order incorporated and adopted the magistrate's findings. Pet. App. A9-A13. Further elaboration was not required.

Nor are the orders deficient because they fail to explain why certain conditions of release would be inadequate. Petitioner suggests (Pet. 21-25) that

the district court should have considered placing Krager in the Witness Protection Program, monitoring petitioner, or prohibiting her from using firearms. With respect to the first suggested condition, the district court correctly observed that placing Krager in the Witness Protection Program would be tantamount to "incarcerating the victim so that [the kidnaper] can be free." Gov't C.A. Br. 17. After finding that petitioner had just used a pistol to kidnap the government's informant, the district court did not have to justify further why the latter two conditions would be inadequate to protect Krager and other potential witnesses from harm. See *United States* v. *Simpkins*, 826 F.2d 94, 97 (D.C. Cir. 1987). In short, both courts below correctly found that the government proved by clear and convincing evidence that no condition of release would assure the safety of Rosemany Krager or other prospective government witnesses. Further review of that factbound claim is not warranted.

Petitioner also contends (Pet. 20-21, 33-34) that the district court did not review "de novo" her request for release on bail because the district court relied on the record made before the magistrate and did not hear any additional evidence. The district court was not required, however, to conduct a new evidentiary hearing. Although the Bail Reform Act permits a defendant to file with the district court a motion for revocation of a magistrate's order of detention (18 U.S.C. 3145(b)), it does not require a new evidentiary hearing. Instead, Section 3145(b) simply requires the district court to determine the motion "promptly." Nor does the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, give the defendant a right to a new evidentiary hearing. 28 U.S.C.

636(b)(1)(A); *United States* v. *Raddatz*, 447 U.S. 667, 673-676 (1980) (even where "de novo" review is required, the district court is not required to hear testimony). In sum, there is no merit to any of petitioner's challenges to her pretrial detention.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

MARCH 1991

[5] To the extent that petitioner claims that her detention violates due process, that claim was rejected by this Court in *United States* v. *Salerno*, 481 U.S. 739, 746-752 (1987).

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 CR 850
Magistrate Bernard Weisberg

UNITED STATES OF AMERICA

v.

SHIRLEY SIMNICK

[Filed Oct. 16, 1990]

PRETRIAL DETENTION ORDER

Defendant Shirley Simnick appeared before this Court on October 9, 1990 for preliminary examination, and for a hearing on the government's motion, pursuant to 18 U.S.C. § 3142(f)(2)(B), to detain defendant pending trial. Defendant was present with retained counsel. The Court reviewed a pretrial services report, and received the testimony of FBI Special Agent Royden Rice, on behalf of the government, as well as Mary Price, Harold Czierski and Linda Anderson, on behalf of defendant. The Court further heard the argument of counsel.

Subsequent to a finding of probable cause on the preliminary examination, the Court considered the government's motion for detention. In determining whether there are conditions of release that would reasonably assure the safety of any person and the

community, the Court reviewed the evidence in accordance with the factors promulgated in 18 U.S.C. § 3142(g).

First, the Court considered the nature and circumstances of the offense charged, including whether the offense is a crime of violence. Defendant is charged with the crime of kidnapping, 18 U.S.C. § 1201(a). The government presented evidence that it has been investigating a business that defendant operated out of her Glenwood, Illinois residence, which business, M & C Consultants ("M & C"), is a front for a prostitution network. During the course of the investigation, an M & C employee, Rosemary Krager, cooperated with the government. On October 4, 1990, defendant questioned Krager about whether she was an informant, and threatened Krager with a handgun. Defendant also made intimidating and threatening comments to Krager. Krager consequently admitted her role as an informant. Defendant subsequently drove Krager from Glenwood, Illinois, to Hammond, Indiana, and later returned to defendant's residence that evening. Considering the nature and circumstances of the kidnapping charge, the Court finds it to constitute a crime of violence.

Second, the Court considered the weight of the evidence against defendant. The government presented evidence to support its charge that defendant kidnapped Krager. Defense counsel presented evidence to rebut that charge. The Court finds the weight of the evidence sufficient at this time, and notes that there may be a credibility question for a jury to determine.

Third, the Court considered defendant's history and characteristics. The government presented evidence that defendant has a previous unlawful use of weapons charge. The government also presented evi-

dence that defendant's escort service served as a pretext for a prostitution network. Evidence concerning the nature of defendant's business was based on a lengthy investigation by the FBI. Considering the defendant's history and characteristics, the Court finds that defendant does not have a substantial criminal history. The Court finds further, however, that a plausible motive for defendant's conduct exists, on the basis of the FBI investigation and Krager's employment with defendant's business.

Finally, the Court considered the nature and seriousness of the danger to any person or the community that would be posed by defendant's release. The government presented evidence that Krager was cooperating with the government in an undercover capacity. Additional evidence was presented that defendant brandished a handgun and threatened and intimidated Krager, a prospective government witness. Considering the nature and seriousness of the danger to Krager that would be posed by defendant's release, the Court finds that a serious risk that defendant will attempt to obstruct justice or attempt to threaten, injure or intimidate Krager or others in the community exists.

For all of the foregoing reasons, as well as those stated in open court, the Court finds that the government has established by clear and convincing evidence that defendant is a serious risk to the safety of the community, and that there is no condition or combination of conditions that will reasonably assure the safety of the community.

THEREFORE, IT IS ORDERED that the government's motion to detain defendant Shirley Simnick is GRANTED.

IT IS FURTHER ORDERED:

1. That defendant be committed to the custody of the Attorney General for confinement pending the disposition of this case.

2. That defendant be confined in a corrections facility separate, to the extent possible, from prisoners awaiting or serving sentences or being held in custody pending appeal.

3. That defendant be afforded reasonable opportunity for private consultation with her attorney.

4. That upon order of a Court of the United States or upon request of an attorney for the government, the person in charge of the correctional facility in which defendant is detained, deliver defendant to the United States Marshal for the purpose of her appearance in connection with court proceedings.

/s/ Bernard Weisberg
BERNARD WEISBERG
United States Magistrate

Dated: October 16, 1990

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